Under familiar principles of statutory construction, the Act must be read to avoid the constitutional question that would arise if Congress had authorized the FCC to prohibit LECs from recovering their actual historical investment. See, e.g., Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Precisely to avoid running afoul of constitutional concerns, where an act of Congress specifies that a regulated business should be allowed a "just and reasonable" rate, such language is universally construed to require compensation sufficient to meet constitutional standards. See, e.g., FPC v. Hope Natural Gas Co., 320 U.S. 591, 595 (1944); see also Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (explaining that congressional standard "coincides with that of the Constitution"). That same construction must be applied to the 1996 Act -- to allow the LECs the opportunity to recover as much of their actual, historical investment as the market will allow. And, most certainly, the Act may not be interpreted to prohibit the States from even considering whether to allow LECs to recover some of their unrecovered historical costs.

2. The FCC's rules unlawfully deny LECs an opportunity to recover their true forward-looking costs.

The national pricing regime imposed by the FCC is invalid for another independent reason: it does not even allow LECs an opportunity to recover their full forward-looking costs. The term "cost" in § 252(d)(1) must be read to ensure that a LEC is permitted an opportunity to recover all of its true costs. Cf. Hope, 320 U.S. at 595; see also Jersey Cent. Power & Light, 810 F.2d at 1175. Indeed, the Constitution requires that a LEC be permitted to recover full costs in each segment of its business. It has long been settled that a regulated enterprise cannot be required to sell a line of service below cost on the theory that profits from another aspect of its business -- particularly an unregulated line of its business -- will compensate for the

confiscatory rates. See, e.g., Brooks-Scanlon, 251 U.S. at 399 (Holmes, J.); see also Norfolk & W. Ry. v. Conley, 236 U.S. 605, 609 (1915) (explaining that a common carrier may not be required to transport a "commodity or class of traffic" at "less than cost").

The rule adopted by the Commission, however, falls woefully short of meeting the constitutional standard by failing to allow an incumbent LEC to recover even its true forward-looking costs. The FCC has dictated that a LEC's forward-looking costs must be based not on the LEC's "existing network design and technology," see First Report and Order ¶ 684, but rather on the costs of a hypothetical network constructed with the "most efficient technology," given the LEC's current wire center locations. Id. ¶ 685. By ignoring the technology a LEC may actually have deployed in favor of a hypothetical most-efficient alternative, this rule ensures that costs will be understated.

In addition, the FCC does not allow LECs to recover their full joint and common costs. The so-called "reasonable allocation" of forward-looking joint and common costs, First Report and Order ¶ 672, that the Commission includes in its pricing rule in fact ensures that a large portion of LEC's joint and common costs will go unrecovered. The FCC determines that it would be reasonable "to allocate only a relatively small share of common costs to certain critical network elements, such as the local loop and collocation, that are most difficult for entrants to replicate," but that it would be unreasonable to allocate common costs "in inverse proportion to the sensitivity of demand for the various network elements and services." Id. ¶ 696. In other words, in more plain English, the LECs are free to allocate joint and common costs to network elements on which they will not be able to recover those costs (because of the availability of competition for those elements), but are not allowed to allocate significant common costs to those elements on which the LEC has a good chance of recovering them in the marketplace.

In reality, the FCC's "reasonable allocation" rule prevents LECs from recovering a large portion of their joint and common costs.

II. GTE WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

If it is allowed to take effect, the Commission's rules will immediately cause irreparable harm to GTE in at least two material respects. First, they will have an immediate and irreversible adverse impact on scores of negotiations and binding arbitration proceedings in which GTE is currently involved pursuant to § 252. Second, by requiring States in such arbitration proceedings to impose below-cost prices on incumbent LECs, the rules will subsidize the entry of inefficient carriers and will thereby cause GTE to suffer extensive and irremediable losses of customers, revenue and goodwill before this Court can review the validity of the Commission's action.

A. The Commission's Order Will Immediately Dictate the Terms of Ongoing Voluntary Negotiations and State Arbitrations.

The Commission's order -- and particularly its pricing standards -- will immediately short-circuit the § 252 negotiations and arbitrations currently under way. By providing a detailed set of default terms, the order will sweep a host of key issues off the bargaining table. For example, the Commission's default pricing levels will remove virtually any incentive a requesting carrier may have to negotiate over price by fixing a baseline from which bargaining can move in only one direction -- down. See McLeod Aff. ¶ 9. Indeed, the Commission has candidly acknowledged that its rules "may serve as a de facto floor or set of minimum standards" that channel negotiations, NPRM, Fed. Reg. 18311-03, at ¶ 20 (CC Docket No. 96-98) (Apr. 19, 1996), and has declared that "[t]he default proxies we establish will, in most cases, serve as presumptive ceilings." First Report and Order ¶ 768. Given the Commission's own predictions, there can be no doubt the rules will have an immediate impact on negotiations

and arbitrations by denying GTE an opportunity to bargain for prices that are higher than those dictated by the Commission. In fact, even before the rulemaking was complete, the mere expectation that the rules would soon be in place had a marked detrimental effect on the bargaining process.[12]

The rules' stifling effect will only be aggravated by the Commission's conclusion under § 252(i) that requesting carriers must be granted access to any individual interconnection, service or network element on the same terms given any other carrier. See First Report and Order ¶ 1314. This radical "most favored nation" requirement will strangle meaningful negotiations by dictating that any concession made by an incumbent LEC as part of an integrated agreement must be automatically available to all requesting carriers without regard to the other terms of the bargain. See McLeod Aff. ¶ 9.

The impact of the Commission's rules will also be further exacerbated by the strict timetables imposed by the Act. After a carrier requests interconnection with an incumbent, that carrier and the incumbent have only 135 days to negotiate an agreement before either party may seek binding arbitration. See § 252(b)(1). Once requested, arbitration must be concluded within nine months of the original interconnection request. See § 252(b)(4)(c). GTE is currently in the midst of negotiating dozens of agreements pursuant to § 252(a)(1) in 28 States. McLeod Aff., Ex. 1. In several instances, the initial 135-day period has already expired, see id.; in others, the 26-day period during which petitions for arbitrations must be filed (160 days following the start of negotiations) has run or will soon run, see id.; and in still others

[12] For example, after weeks of serious negotiations, a comprehensive understanding between GTE and Sprint was scuttled in part because it was anticipated that the Commission's proxy prices would give Sprint more advantageous terms than it could negotiate from GTE. See McLeod Aff. ¶ 11.

arbitrations have already been requested and must be resolved by as early as November 8, 1996. McLeod Aff., Ex. 2.[13] In those arbitrations, state commissions will be required to impose the default prices mandated by the Commission unless they can first approve completed cost studies consistent with the Commission's methods. See First Report and Order ¶ 619.

Moreover, certain requesting carriers, such as AT&T, are urging state commissions simply to impose the FCC's proxy prices on GTE immediately rather than undertaking such studies. See McLeod Aff. ¶ 14. AT&T, in fact, has already succeeded in having that position adopted in the arbitration proceeding between GTE and AT&T in California. In an oral ruling, an administrative law judge recently determined that rates in California will be set using the FCC's proxies since it would be too inconvenient to work with actual cost studies in the time available. Thus, while GTE has already prepared and offered cost data in California, under this ruling the arbitration will focus instead on applying the FCC's proxy prices. As this experience already shows, the FCC's proxies and the impending deadlines imposed by the Act simply put inexorable pressure on the parties and the States to treat the FCC's rules as the presumptive terms for the entire agreement.

As a result, if the rules are not stayed pending review, GTE will be left with two uninviting alternatives. GTE may enter into "privately negotiated" agreements whose terms are, in reality, dictated by the Commission's rules, or it may wait to have similar terms imposed on it by state commissions acting pursuant to the FCC's diktat. In the event some of the rules are later struck down, GTE will have lost forever the opportunity to negotiate with competing carriers free from the influence of the Commission's unauthorized set of presumptive terms.

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[13] For example, arbitrations with AT&T in virtually all GTE States must be resolved by December 12, 1996. See McLeod Aff., Ex. 2.

The loss of such bargaining opportunities in itself constitutes a classic form of irreparable injury. See Carson v. American Brands, Inc., 450 U.S. 79, 87-88 & n.14 (1981) (loss of opportunity to compromise Title VII claims on mutually agreeable terms as preferred by Congress is irreparable); Local Division 732, Amalgamated Transit Union AFL-CIO v. Metropolitan Atlanta Rapid Transit Auth., 519 F. Supp. 498, 500 (N.D. Ga. 1981) (lost bargaining opportunities constitute harm of an irreparable nature), vacated on other grounds, 667 F.2d 1327 (11th Cir. 1982).

If the current rules are overturned, moreover, it will not be possible to undo the harm to GTE. Even if it might be possible to reopen negotiations, it would be impracticable, if not impossible, to undo the effects the Commission's order will have on scores of agreements negotiated or arbitrated under its shadow. Once agreements dictated by the rules are in place, companies will structure a range of business plans around those agreements. See Affidavit of Barry W. Paulson ("Paulson Aff.") ¶¶ 5-7 (attached to Joint Motion at Tab E). Customer expectations under new service arrangements similarly will solidify. Once these changes take place, it will not be possible for parties simply to scrap working arrangements to go back to square one under a new set of rules.

B. The Commission's Rules and Pricing Standards Will Result in a Substantial and Irremediable Loss of Customers, Goodwill and Revenue.

As soon as it becomes effective, the national pricing regime promulgated by the Commission will begin subsidizing competitors at GTE's expense, thereby causing GTE to suffer irremediable losses in customers, goodwill and revenue. As outlined above, the Commission's pricing regime systematically requires incumbents to offer requesting carriers prices below actual costs. The Commission's rules will thus artificially allow entry by competitors whose own inefficiencies will be, in effect, subsidized by below-cost pricing. See Affidavit of Orville D.

Fulp ("Fulp Aff.") ¶ 5 (attached at Tab C). The result will necessarily be a loss of customers and revenue unrelated to efficient competition, and such losses will be effectively impossible for GTE to recapture. See Affidavit of Donald M. Perry ("Perry Aff.") ¶¶ 6-9 (attached at Tab D).

The default proxy prices the Commission has set for unbundled loops and switching ensure that GTE cannot come anywhere close to recovering its "total element long run incremental costs" for loops and switching, even where the TELRIC amounts for those elements are calculated purely according to the FCC's own chosen methodology, and even when no additional allocation of joint and common costs is included. See Supp. Trimble Aff. ¶¶ 6, 12 - 19 (attached at Tab B).

Competitors that obtain access to unbundled loops and switching at anything approaching the Commission's artificial prices will be able to offer local service at a substantial discount from GTE's rates, thereby ensuring that GTE will suffer a loss in market share. This artificial advantage will be particularly keen for numerous competing carriers that already have certain facilities, such as switches, in place. See Fulp Aff. ¶¶ 5-10, 14. Such competitors are well-poised to take immediate advantage of the Commission's price subsidies, particularly in urban areas where they can rapidly win over lower-cost, higher-profit customers. See id. ¶¶ 8-9, 14. The demand for local service is such that a rival who offers even a slight discount from an incumbent's rates can cause the incumbent to suffer a substantial loss in market share. See Perry Aff. ¶¶ 6-7. Taken together, the Commission's various below-cost pricing rules will result in substantial and rapid losses of market share for GTE, and the losses resulting from this subsidized competition will be permanent. See id. ¶¶ 8-9.

In addition to the number of lost subscribers, incumbent LECs like GTE will suffer nonquantifiable injury to customer goodwill as a result of the Commission's order. The

Commission's pricing rules will artificially subsidize rivals and allow them to undercut an incumbent's prices even if they cannot provide any greater efficiencies. See Fulp Aff. ¶ 5. The new competitors' ability to offer lower rates, in turn, will seriously harm the incumbent's reputation and customer goodwill since customers will naturally perceive higher prices as a sign of inefficiency. Such unrecoverable losses of goodwill are routinely recognized as a form of irreparable injury justifying a stay. See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994).[14]

Finally, to the extent GTE begins providing services or access pending appeal under pricing standards that are later struck down, GTE will incur substantial permanent losses. Obviously, as they lose customers to competitors who pay only the below-cost prices set by the Commission, incumbents such as GTE will lose retail revenues. See Perry Aff. ¶ 9. Moreover, there will be no way to obtain redress for such losses, since neither the competing carriers nor the Commission likely could be required to make GTE whole even if the rules are later struck down. The threat of such unrecoverable economic loss constitutes irreparable harm justifying a stay pending judicial review. See, e.g., Baker Elec. Corp., Inc. v. Cheske, 28 F.3d 1466, 1473 (8th Cir. 1994); Airlines Reporting Co. v. Barry, 825 F.2d 1220, 1226-29 (8th Cir. 1987).

III. A STAY PENDING JUDICIAL REVIEW WILL NOT HARM OTHER PARTIES AND WILL SERVE THE PUBLIC INTEREST.

A stay will cause no harm to other parties for the simple reason that the FCC's rules are not needed for the transition to local competition under the Act. As Congress envisioned, competitive entry into local markets will proceed on schedule through private negotiations and

[14] See also Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) ("The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.").

state arbitrations even without those rules. Moreover, if the rules are ultimately upheld, agreements can be readily modified to comply with the Commission's prescribed national rules. Thus, if this Court grants a stay, American consumers will receive the benefits of local competition consistent with the statutory deadlines and the goal of promoting economically sound investment and entry.

For that very reason, many private negotiations have already gone forward and many were nearing completion when the Commission announced its rules. The bulk of the work of creating local competition can thus be achieved by private parties. Indeed, it would be ironic for potential entrants to argue that any delay in the Commission's regulations will harm them, when the paramount emphasis in the Act was to allow private negotiations to create the new market in local telephony largely unfettered by detailed federal regulations.

For similar reasons, the public interest in achieving the rapid and efficient introduction of competition in the local exchange will best be furthered by a stay pending judicial review. Privately negotiated agreements backed by arbitrations are the key mechanism Congress chose to facilitate the growth of local competition, and negotiations will continue under a stay. All sides to these negotiations have incentives to proceed and conclude agreements under the Act. New entrants will push forward to take advantage of opportunities in the local exchange market while incumbent LECs will want to earn fair compensation for interconnection arrangements required under the Act. A stay is thus entirely consistent with the public interest, since the system for creating local competition under the Act can go forward whether or not the Commission's rules are in place. If a stay is denied, however, there is a substantial risk that progress toward competition will be gravely impaired due to the false start created by the

Commission's unlawful rules and their immediate destructive effect on the system of free, private negotiation that Congress built into the Act.

CONCLUSION

For the foregoing reasons, this Court should stay the effectiveness of the Commission's First Report and Order in its entirety pending disposition of GTE's petition for review. At a minimum, the Court should stay the effectiveness of the pricing provisions in the Commission's rules, §§ 51.501-51.515, 51.601-51.611, 51.701-51.717. The Court should also expedite judicial review, so that any delay to the development of competition caused by the FCC's false start is minimized.

Respectfully submitted,

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Date: September 16, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GTE Service Corporation, GTE Alaska, Inc., GTE Arkansas Inc., GTE California Inc., GTE Florida Inc., GTE Midwest Inc., GTE South Inc., GTE Southwest, Inc. GTE North Inc., GTE Northwest Inc., GTE Hawaiian Telephone Company Inc., GTE West Coast Inc., Contel of California, Inc., Contel of Minnesota, Inc. and Contel of the South, Inc., Petitioners, v. Federal Communications Commission and United States of America, Respondents.	Case No. _____ (D.C. Circuit Case No. 96-1319) (Consolidated with Case No. 96-3321)

APPENDIX TO
MOTION FOR STAY PENDING JUDICIAL REVIEW
AND FOR EXPEDITED JUDICIAL REVIEW

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TAB A

§ 152. Application of chapter

. . .

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

SEC. 251. [47 U.S.C. 251] INTERCONNECTION.

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS.—Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.—Each local exchange carrier has the following duties:

(1) RESALE.—The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) NUMBER PORTABILITY.—The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) DIALING PARITY.—The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS-OF-WAY.—The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION.—The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) DUTY TO NEGOTIATE.—The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection.

The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) INTERCONNECTION.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) UNBUNDLED ACCESS.—The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) RESALE.—The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) NOTICE OF CHANGES.—The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) COLLOCATION.—The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the car-

rier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) IMPLEMENTATION.—

(1) IN GENERAL.—Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) ACCESS STANDARDS.—In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) PRESERVATION OF STATE ACCESS REGULATIONS.—In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) NUMBERING ADMINISTRATION.—

(1) COMMISSION AUTHORITY AND JURISDICTION.—The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) COSTS.—The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS.—

(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES.—

(A) EXEMPTION.—Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is tech-

nically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE.—The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) LIMITATION ON EXEMPTION.—The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS.—A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.—On and after the date of enact-

ment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.—

(1) DEFINITION.—For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS.—The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) SAVINGS PROVISION.—Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

SEC. 252. [47 U.S.C. 252] PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.

(a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION.—

(1) VOLUNTARY NEGOTIATIONS.—Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting tele-

communications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) MEDIATION.—Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION.—

(1) ARBITRATION.—During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) DUTY OF PETITIONER.—

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) OPPORTUNITY TO RESPOND.—A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) ACTION BY STATE COMMISSION.—

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) REFUSAL TO NEGOTIATE.—The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) STANDARDS FOR ARBITRATION.—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) PRICING STANDARDS.—

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.—Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.—

(A) IN GENERAL.—For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION.—This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.—For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) APPROVAL BY STATE COMMISSION.—

(1) APPROVAL REQUIRED.—Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) GROUNDS FOR REJECTION.—The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) PRESERVATION OF AUTHORITY.—Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) SCHEDULE FOR DECISION.—If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a

State commission in approving or rejecting an agreement under this section.

(5) COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) REVIEW OF STATE COMMISSION ACTIONS.—In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) STATEMENTS OF GENERALLY AVAILABLE TERMS.—

(1) IN GENERAL.—A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) STATE COMMISSION REVIEW.—A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) SCHEDULE FOR REVIEW.—The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) AUTHORITY TO CONTINUE REVIEW.—Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) DUTY TO NEGOTIATE NOT AFFECTED.—The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) CONSOLIDATION OF STATE PROCEEDINGS.—Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) FILING REQUIRED.—A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS.—A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.—For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

TAB B